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92-1947

No. _____

Supreme Court, U.S.
FILED
1993
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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

APR 14 1993

October Term, 1992

Edward B. Woods, Petitioner

vs.

A.T. & T. Information Systems, Respondent

Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

Petition For Writ of Certiorari

Edward B. Woods
140 Greenwood Place
Decatur, Georgia 30030
(404) 377-8350

Questions Presented

Were my constitutional rights and civil rights violated when the District Court erred in not granting appellant's motion for leave to proceed in forma pauperis on appeal when the court provided appellant with the wrong form, which has been removed from my file?

Would I have needed ten (10) days if proper form had been issued?

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No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1992

Edwards B. Woods, Petitioner

vs.

A.T. & T. Information Systems, Respondent

Petition for Writ of Certiorari
To The United States Court of
Appeals For The Eleventh Circuit

Petitioner, Edward B. Woods, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit that Petitioner's Complaint should not have been dismissed as frivolous, without arguable merit and untimely under 42 U.S.C. Section 1981. That request for oral argument should be granted.

Opinions Below

The opinion of F.R.C.P. Rule 60(b)(6) that the district court abused its discretion in holding that, notwithstanding any mitigation circumstances a two year delay in filing is patently "unreasonable" under rule 60(b). On the contrary, federal courts have consistently held that dismissal is not warranted for failure to file within a "reasonable time" where the movant can show mitigating circumstances.

In Klapprott v. United States, 335 U.S. 601 (1949), the Supreme Court held that a Rule 60(b)(6) motion was not untimely despite being filed seventeen (17) years after entry of judgment where movant alleged that at various times during that period he was ill, penniless, and incarcerated. Similarly, the Supreme Court in United States v. Karaholias, 205 F.2d 331 (1953) excused a seventeen (17) year delay in filing a Rule 60(b)(6) motion where movant alleged that he was absent from the jurisdiction due to family illness. App. 5-7. These cases are strikingly analogous to the case at bar. Petitioner's motion clearly alleged that at various times during the period in question he had

been incarcerated, similarly, residing out of the state of Georgia, suffering from severe financial and emotional hardship occasioned by divorce proceedings, family illness of his young daughter having heart implant surgery. These grounds alone should have been sufficient to excuse the filing delay under the Klapprott and Karaholias standard, the motion also alleged that the plaintiff was without the advice and assistance of counsel during this period and was therefore forced to pursue his post-judgment remedies as a *pro se* litigant. App. 5-6.

Indeed, the circumstances surrounding the withdrawal of Petitioner's counsel during the pendency of his appeal in Woods 1, suggests that Petitioner lacked knowledge of the disposition of that case. App. 5-6, 14. Fleming v. Mante, 10 F.R.D. 391 (1950) (motion for relief from judgment granted three (3) years after its entry where plaintiff's counsel withdrew prior to entry of judgment and plaintiff no knowledge of the entry of judgment); see also, Transport Pool Div. of Container Leasing Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1303 (1970) (motion for relief granted

after more than one (1) year where attorney's withdrawal forced movant to seek post-judgment relief as *pro se* litigant.

It is well established that a trial court should construe a motion for relief from judgment liberally to ensure that claims are tried on the merits rather than dismissed on mere technicalities. Schanen v. U.S. Dept. of Justice, 762 F.2d 805 (1985). In this case, the trial court clearly abused its discretion (power) by failing to consider the mitigating circumstances raised in plaintiff's motion. App. 9-10. Consequently, dismissal for failure to file within a "reasonable" time was not warranted. This is particularly true where the movant is proceeding *pro se*. Haines v. Kerner, 404 U.S. 519 (1972); Conley v. Gibson, 355 U.S. 41, 45 (1957); Baldwin County Center v. Brown, 466 U.S. 1147 (1984).

Jurisdiction

The court of appeal's opinion in this matter was filed on October 3, 1987. The court of appeal's final decision of this case was issued on January 14, 1993.

Constitutional and Statutory Provisions Involved

Amendment 13-15 to the United States Constitution is set forth below.

Statement of the Case

The United States District Court, Northern District of Georgia, Atlanta Division, had jurisdiction pursuant to 42 U.S.C. Section 1981.

On October 19, 1987, United States District Court for the Norther District of Georgia, Atlanta Division, dismissed Complaint on a frivolity untimely determination. In an Order dated June 8, 1988, the Court denied the Petitioner Rule 60(b) motion for relief from judgment. The court held that, although the Petitioner argued that his Complaint stated a cause of action under 42 U.S.C. §2000e and that the Petitioner's motion must be denied because he did not bring this action until fifteen (15) months after receiving his right to sue letter from EEOC Commission and was delinquent in bringing his motion for relief from judgment.

An Order unsigned by a judge and the date of the Order was smeared out, stated that "the Petitioner's Motion for Relief from Judgment was hereby Granted, and the Clerk of Court is hereby directed to vacate the judgment of dismissal entered on October 19, 1987. It is further ordered that this Court's Order dated October 19, 1987 is hereby vacated." Unsigned and undated. Why the conflict in the Eleventh Circuit?

This disagreement of the Eleventh Circuit creates a conflict among the circuits and confuses Petitioner with regard to violation of his civil rights and his constitutional rights as a born American citizen.

I called the Supreme Court long distance in October, 1987, asking if it were wrong form me trying to get my job back through arbitration. I was told if I did not get my job back to file again within two (2) years.

You see, I was accused of stealing and A.T.& T. gave me a bad record. When I applied for a job at employment offices, I was told that I was fired because I was a thief. This too violated my civil rights and constitutional right. I did not steal anything. I

put old, used, broken-down, discarded boxes, used opened bags of styrofoam and plastic chips outside of loading dock near by supervisors truck, which my cousin picked up later to use for packing because she was moving. I did not remove anything off the premise. There were witnesses. My aunt and a friend who came to pick me up at work and co-workers getting off from work. Think about it, I worked for A.T. & T. for 13 years, I was on call for 24-hours, I had a beeper, keys to the building, and I went into the building all hours of night alone to fill orders. I never took anything. My supervisors plotted to fire me. You see, I many times asked for a transfer but was refused. There were only two (2) blacks working in this plant. A white fellow had befriend me - told me that my immediate supervisor was making paper airplanes out of my transfer forms and playing with them in his office. One day my immediate supervisor came to me stating that he had a white boy that lived in that area and he wanted to give him my job and that I could move to the downtown plant. I told him that when I wanted to go you would not let me go, so I do not want to go. Shortly after that, I was fired for stealing -

being a thief. Top line supervisors told me right before I was fired that if I resigned, I would be given $14,000 and my name would be cleared. "I told them that would be lying and against my christian beliefs and that I would be admitting that I had stolen - my mother taught us not to lie nor steal. I did not steal anything that I had asked long time ago to take discarded unused boxes home to put trash on the curb in." I was granted that permission. All of the fellows were allowed to do this including the supervisors. I did not take A.T. & T.'s $14,000, nor was I granted unemployment. I lost my family, my house, my pride, my hair and was without a steady job for seven (7) years because of a system that allows lying and that others were permitted to violate my civil rights and constitutional rights - the "Land of the Free". I am asking the Supreme Court, the Highest Court in the land, to let me be heard. If the Supreme Court does not help, who can I and others go to?

Sir, I so much want to be near my children. I still cannot get a job in the Atlanta area, my name is still defamed.

Reasons for Granting the Writ

Certiorari should be granted for two reasons:

I. Petitioner's motion was timely, and not a substitute for appeal, within the contemplation of Rule 60(b).

Court argues that Petitioner's motion should be denied because no notice of appeal was filed and the motion was not filed with the time for an appeal from the subject judgment. This argument is founded upon the generic proposition that a Rule 60(b) motion cannot be a substitute for appeal, a principle established by the United States Supreme Court in Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209

The Ackermann rationale was quite explicit:

> (Rule 60(b) is not usually available to one who) made the considered choice not to appeal. . . . His choice was a risk, but calculated and deliberate and such deliberate choices are not to be relieved from 340 U.S. at 198, S.Ct. at 211.

In Ackermann, as in the other cases relied upon by the Respondent, the party seeking relief from judgment had, with benefit of counsel, made a deliberate choice not to appeal. No such deliberate choice was made here. The *pro se* petitioner

sought counsel once notified of the judgment of dismissal retaining counsel on November 30, 1987. By then the appeal time had run, but it cannot be said that this was a "free, calculated and deliberate" chose not to appeal.

Another very important distinction between this case and those relief upon by the Respondent is that in all of the Respondent's cases relief was sought from a judgment which had been entered after an adjudication on the merits.

Rule 60(b) of the Federal Rules of Civil Procedure is a remedial provision intended to prevent injustice by allowing parties their day in court even though some technical error has occurred which would otherwise be grounds for default or dismissal . . . . it is generally held that even where there may be evidence in the record which would call for dismissal, any doubt should be resolved in favor of a trial on the merits. Greater Baton Rouge Golf Assn. v. Recreation and Park Comm'n for the Parish of East Baton Rouge, 507 F.2d 227, 228-229 (5th Cir. 1975) (emphasis added); Seven Elves Inc. v. Eskenazi, 635 F.2d 396, 403 (5th Cir. 1981). Petitioner here has had no opportunity for a

judicial determination of the merits of his cause. He is in that way like one who has suffered a default judgment, as to which Rule 60(b) and its Rule 55 counterpart have always been very liberally applied in large part precisely because of the injustice often inherent in failure to reach the merits of the claim. Seven Elves Inc. v. Eskenazi, *supra* at 403. Unlike a defaulting party, however, Petitioner here did take a legal action to protect his rights by filing a complaint which set forth a timely claim for relief, even though he was not well enough informed to specify the correct statutory basis upon which his cause of action and the jurisdiction of the court depended. The equitable principles of Rule 60(b) should not operate more harshly on one who has taken steps to assert his rights than on one who has suffered a default from inaction.

In any event, the proposition that a Rule 60(b) motion must be filed within the time allowed for an appeal is simply incorrect, and this court's contrary holding in Crane v. Kerr, 53 F.R.D. 311 (N.A. Ga. 1971) no longer accurately states the law in this circuit. Respondent's own authority explicitly recognizes that

the former Fifth Circuit "has held that the time available for taking an appeal is not a per se imitation on filing of a Rule 60(b)(1) motion." Parks v. U.S. Life & Credit Abrasive Company, 542 F.2d 928 (5th Cir. 1976), explicitly construed the exact appellate precedent relied upon by this court in Crane v. Kerr: Fifth Circuit cases mention the time for noticing appeal as a relevant interval in timeliness. But none of our cases clearly states that it the invariable rule that later motions are untimely, even in the "fundamental misconception" category. Instead, these cases hold only that a motion made within the time period for noticing appeal is timely, (citations omitted), that later motions were not deemed automatically untimely is indicated by the court's statement in meadows:

> It is the view of this Petitioner that under the present rule a court is authorized under subsection (1) to correct any unjust situation, substantive "mistake" of its own, if motion is made within a reasonable time, which would clearly encompass a time not exceeding the time allowed for appeal.

409 F.2d at 752 N. 4 (emphasis added by the court). Had the court deemed the time for appeal a rigid and established limit for

Rule 60(b) motions there would have been no need for the clearly encompass language.

The short delay, nowhere close to the one year limit on some Rule 60(b) motions is simply attributable to a *pro se* litigant's excusable lack of knowledge of the rules, coupled with the time expended obtaining counsel to seek relief from the judgment.

II. Petitioner's civil rights and constitutional rights have been violated.

Petitioner filed a complaint setting forth a cognizable and timely claim for relief, albeit on different statutory grounds than those in the preprinted form he utilized. As demonstrated by the authorities cited in Petitioner's Initial Brief, it is the factual basis of the claim which is most critical for pleading purposes under the federal rules (see, p. 10-11 infra) and there is no suggestion that the factual allegations here are anything but sufficient. Similarly, Petitioner's authorities show that the rules of pleadings are extremely liberal in permitting a sufficient factual claim to go

forward even when the correct legal theory is not stated until much later.

That is not to say that an exhaustive, creative *sua sponte* search for cognizable theories must accompany every §1915 frivolity determination, but neither should that determination ignore these established pleading rules or hold a *pro se* litigant to a more exacting pleading standard than is applied to one represented by counsel. Here, the near universal availability of 42 U.S.C. §1981 to support a claim of race discrimination in employment is so well established that the court should have considered it. A *pro se* litigant should not be assumed to have made a knowing and intelligent choice between Title VII and §1981 under the circumstances presented here.

Respondent has claimed and can claim no prejudice from any delay. The *pro se* petitioner filed the complaint with the time allowed for §1981 claims, and cannot realistically be said to have been dilatory or to have caused undue delay in arranging for an attempt to obtain relief from the judgment at issue. His claims have not been adjudicated on their merits in this action. Under

these circumstances, Petitioner asserts that the balance to be struck under Rule 60(b) tips readily in favor of a adjudication on the merits, so that justice may be achieved in this particular case. Seven Elves Inc. v. Eskenazi, *supra* at 401; Greater Baton Rouge Golf Assn. v. Recreation & Park Comm'n for the Parish of East Baton Rouge, *supra* at 229. That justice is all Petitioner asks.

The court at the hearing on this motion expressed its opinion that failure to serve Respondent was an insufficient basis for denying the motion for relief from judgment, since issuance of process had been precluded by order of the magistrate. Petitioner agrees. Moreover, service within the limitations period is not required, only filing followed by service within a reasonable time. 4 Wrights & Miller, Fed. Practice and Procedure, §1056 (1987). The court's prevention of issuance of process must render lack of service here reasonable.

Finally, Respondent argues that Title VII and Section 1981 are separate and independent remedies, and that filing a Title VII does not toll the limitations period on a Section 1981 claim. both points are correct, but have no bearing on the issues before this

Court. Petitioner argues no extension of any limitations period, relying instead on the established limitations period for Section 1981 claims.

There is an implication in this last defense that relief should be denied because any subsequent proposed amendment specifying Section 1981 as a theory supporting relief would be time barred, but that is not so . F.R.C.P. Rule 15(c) explicitly provides that amendments based upon the same "conduct, transaction, or occurrence" set forth in the original pleading relate back to the initial filing as if filed at that time. This relation back provision obviates any limitation questions under those circumstances, so long as the initial complaint was filed within the limitations period. Though there was a complete change in the legal theory of Petitioner's complaint, their claim continued to arise out of the conduct, transaction or occurrence attempted to be set forth in the original complaint. I hold, therefore, that the second amended complaint relates back to the date of the original complaint, and that the action was not barred by the two year limitation. U.S. v. Johnson, 288 F.2d 40, 42 (5th Cir. 1961). This

principle has been explicitly applied in the Title VII/Section 1981 context, where the original cause of action was barred but the amended cause of action, relating back, was not. Sessions v. Rusk State Hospital, 648 F.2d 1066, 1070 (former 5th Cir. 1981); Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. 1980).[1]

Jackson v. H.K. Porter Company, 485 F. Supp. 356 (N.D. Alb. 1980), *aff'd* 648 F.2d 337 (5th Cir. 1981); and, Taylor v. Bungl Corp., 775 F. 2d 617 (5th Cir. 1985) are not to the contrary. Jefferson held that a case which was litigated to conclusion as a Title VII action, and in which §1981 claims had been amended out of the initial complaint, did not toll the limitations period for a later and otherwise untimely §1981 suit. 698 F.2d at 339. That situation has no relation to this one. Similarly, the Taylor case held that filing a charge of discrimination with the EEOC did not toll the §1981 limitations period, nor was there any tolling as a

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[1] Harris v. Commonwealth of Pennsylvania, 419 F. Supp. 10 (N.D. Pa. 1976), cited by Respondent, is an anomalous decision at odds with the plain language of Rule 15(c) and with the above-cited controlling law in this circuit.

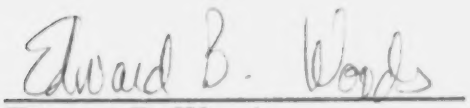
result of a prior timely §1981 action which had been voluntarily dismissed. Again, those circumstances have no bearing on the facts of this case. Courts proceeding including the dates and many denials by the court - many dates are not complete, thus are missing.

Conclusion

For the reasons set forth above, a writ for certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated: April 14, 1993.

Respectfully submitted,



Edward B. Woods
Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8409
Non-Argument Calendar

District Court Docket No. 1:87-cv-2159-WCO

EDWARD B. WOODS,

Plaintiff-Appellant,

versus

AT&T INFORMATION SYSTEMS, INC., LOWELL E. SMITH, CARROLL DUKES, ED FURLONG,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, Chief Judge, FAY and BLACK, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Northern

District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 13, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb
Deputy Clerk

Appendix "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8409
Non-Argument Calendar

D.C. Docket No. 1:87-cv-2159-WCO

EDWARD B. WOODS,

Plaintiff-Appellant,

versus

AT&T INFORMATION SYSTEMS, INC., LOWELL E. SMITH, CARROLL DUKES, ED FURLONG,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(November 13, 1992)

Before TJOFLAT, Chief Judge, FAY and BLACK, Circuit Judges.

PER CURIAM:

A review of this matter convinces us that the district court did not abuse its discretion in denying appellant's successive motion filed under Fed.R.Civ.P. 60(b).

AFFIRMED.

Signed: Miguel J. Cortez
Clerk

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8409

EDWARD B. WOODS,

Plaintiff-Appellant,

versus

AT&T INFORMATION SYSTEMS, INC.,
LOWELL E. SMITH, CARROLL DUKES,
ED FURLONG,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, FAY and BLACK, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the Court having requested that the Court be polled and rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Ruile 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: (issued January 14, 1993)

Pl(not legible) Fay
UNITED STATES CIRCUIT JUDGE

Appendix "C"